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5 IN THE UNITED STATES DISTRICT COURT

6 FOR THE NORTHERN DISTRICT OF CALIFORNIA

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10 CRS RECOVERY INC. and DALE MAYBERRY,

No. 06-07093 CW

11 Plaintiffs,

12 v.  
13 JOHN LAXTON, NORTHBAY REAL ESTATE,  
14 INC., et al.,  
15 Defendants.

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17  
18 ORDER GRANTING  
19 TRUSTEE'S MOTION TO  
20 SET ASIDE DEFAULT  
21 AND GRANTING  
22 PLAINTIFFS' MOTION  
23 TO SCHEDULE CASE  
24 MANAGEMENT  
25 CONFERENCE  
(Docket Nos. 240 and  
26 251)

26 Linda Green, the Chapter 7 Trustee of the Estate of Defendant  
27 Northbay Real Estate, Inc. moves to set aside the Clerk's Entry of  
28 Default against Northbay. Plaintiffs CRS Recovery, Inc. and Dale  
Mayberry oppose the motion. Plaintiffs also file an administrative  
motion to schedule a case management conference. The matters were  
submitted on the papers. Having considered all of the papers filed  
by the parties, the Court GRANTS the Trustee's motion to set aside  
the Clerk's Entry of Default and grants Plaintiffs' motion to  
schedule a case management conference.

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## BACKGROUND

2 On April 6, 2010, the Ninth Circuit issued its decision in CRS  
3 Recovery v. Laxton, 600 F.3d 1138 (9th Cir. 2010), in which it  
4 reversed this Court's grant of summary judgment to Plaintiffs on  
5 the issue of ownership of the domain name RL.com, finding that  
6 there were disputed issues of material fact about whether the  
7 domain name had been transferred by fraud or theft and whether  
8 Mayberry had abandoned the domain name before Defendant John Laxton  
9 acquired it. On July 13, 2010, this Court held a case management  
10 conference after remand. At the case management conference, Laxton  
11 advised the Court that counsel who represented him and Northbay was  
12 withdrawing and he was in the process of securing new counsel. The  
13 Court cautioned Laxton that he could not represent Northbay,  
14 because a corporation had to be represented by an attorney. The  
15 Court established a trial date of December 13, 2010, but did not  
16 set a date by which new counsel was required to appear. On July  
17 21, 2010, the Court granted the parties' stipulation to allow the  
18 withdrawal of Plaintiffs' attorney.

19 After the case management conference, Laxton attempted to  
20 locate new counsel without success and, in a letter dated September  
21 15, 2010, he advised the Court of his difficulty in obtaining  
22 counsel and requested a continuance of the trial date. On  
23 September 20, 2010, the Court denied the request for a continuance  
24 and directed Laxton to confer with Plaintiffs' counsel to schedule  
25 his deposition for a date no later than October 15, 2010.

26 On September 29, 2010, Laxton advised Plaintiffs' counsel that  
27 he intended to file for personal bankruptcy and, on October 13,

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1 2010, Laxton filed a Chapter 13 bankruptcy petition. Laxton states  
2 that, at that time, he understood that his bankruptcy filing would  
3 stay this litigation, including his need to appear at any  
4 deposition.

5 On November 5, 2010, Plaintiffs filed a request to enter  
6 default against Northbay on the ground that neither Laxton nor  
7 anyone else on Northbay's behalf had given any indication that  
8 Northbay expected to retain counsel. In a footnote in the request,  
9 Plaintiffs noted that Laxton had not sat for the completion of his  
10 deposition as representative of Northbay as the Court had ordered.  
11 On November 10, 2010, the Clerk entered a default against Northbay.  
12 On November 15, 2010, the Court entered an order staying all  
13 proceedings against Laxton pursuant to the bankruptcy stay and  
14 ordered Plaintiffs to file a motion for default judgment against  
15 Northbay by December 15, 2010. Also on November 15, 2010, Northbay  
16 filed a Chapter 7 bankruptcy petition. On December 15, 2010,  
17 Plaintiffs filed a motion for default judgment against Northbay and  
18 served it on Northbay by email to Laxton. On January 6, 2011, this  
19 case was administratively closed because both Defendants had filed  
20 for bankruptcy protection.

21 Subsequently, Plaintiffs filed, in Northbay's and Laxton's  
22 bankruptcy cases, motions to lift the automatic stay so that this  
23 case could be litigated to final resolution in this Court.  
24 Following the filing of those motions, the Trustee for Northbay,  
25 with the bankruptcy court's approval, retained special counsel for  
26 Northbay, and the Trustees for both bankruptcy estates consented to  
27 Plaintiffs' application to lift the automatic stay.

1 Now the Northbay Trustee moves, under Rule 55(c) of the  
2 Federal Rules of Civil Procedure, to set aside the default entered  
3 against Northbay.

## LEGAL STANDARD

5 Federal Rule of Civil Procedure 55(c) provides that a court  
6 "may set aside an entry of default for good cause." The district  
7 court has discretion to determine whether a party demonstrates  
8 "good cause." Madsen v. Bumb, 419 F.2d 4, 6 (9th Cir. 1969). The  
9 court's discretion is particularly broad where a party seeks to set  
10 aside an entry of default rather than a default judgment. Mendoza  
11 v. Wight Vineyard Mgmt., 783 F.2d 941, 945 (9th Cir. 1986).

In evaluating whether a party has demonstrated good cause, a district court may consider the following factors: (1) whether the defendant's culpable conduct led to the default; (2) whether the defendant has a meritorious defense; and (3) whether setting aside the default would prejudice the plaintiff. TCI Group Life Ins. v. Knoebber, 244 F.3d 691, 696 (9th Cir. 2001). Default judgments are "ordinarily disfavored" because "[c]ases should be decided upon their merits whenever reasonably possible." Eitel v. McCool, 782 F.2d 1470, 1472 (9th Cir. 1986). Thus, whenever "timely relief is sought . . . and the movant has a meritorious defense," a court must resolve any doubt in favor of setting aside the default. Mendoza, 783 F.2d at 945-46. The party seeking to vacate the entry of default bears the burden of demonstrating that these factors favor doing so. TCI Group Life, 244 F.3d at 696.

## DISCUSSION

## I. Culpable Behavior

A defendant's conduct is culpable "where there is no explanation of the default inconsistent with a devious, deliberate, willful or bad faith failure to respond." District Council 16 Northern California Health and Welfare Trust Fund v. Alvarado, 2010 WL 2765522, \*2 (N.D. Cal.) (citing TCI, 244 F.3d at 697-98). Plaintiffs contend that Northbay's conduct violated the Court's orders, was willful and deliberate and, therefore, was culpable. The Trustee argues that this is not the typical case for default because Northbay answered Plaintiffs' complaint and the only ground for default is the fact that Northbay was unrepresented by counsel for a few months prior to filing for bankruptcy. The Trustee contends that the temporary lack of counsel did not violate any order of the Court because the Court never set a date by which Northbay had to retain counsel and Northbay never appeared before this Court without counsel. The Trustee also argues that Laxton was diligent in attempting to locate new counsel for Northbay, was unable to do so for financial reasons, but kept Plaintiffs and the Court apprised of his efforts, thus evidencing good faith.

The Court concludes that, under these circumstances, there is no showing of a devious, deliberate or bad faith failure to obtain counsel. Therefore, this factor weighs in favor of setting aside the entry of default.

## II. Prejudice

The prejudice required to defeat a motion to set aside entry of default must result in greater harm than delaying the resolution

1 of the case; it must result in tangible harm such as loss of  
2 evidence, increased difficulty in discovery or an opportunity for  
3 fraud or collusion. District Council, 2010 WL 2765522 at \*3; TCI,  
4 244 F.3d at 701.

5 Plaintiffs argue that they have been prejudiced by the delay  
6 in going to trial and by the fact that Laxton has sold one of his  
7 assets, which might have been used to pay a judgment in their  
8 favor. The delay here has been a few months and is, therefore,  
9 insufficient to cause prejudice. Laxton's sale of an asset also is  
10 insufficient to establish prejudice because there is no Court order  
11 prohibiting such a sale and an award of damages in favor of  
12 Plaintiffs at this point is speculative. Therefore, this factor  
13 weighs in favor of setting aside the default.

14 III. Meritorious Defense

15 Pursuant to the Ninth Circuit's opinion, there are two  
16 disputed issues of material fact. The first is whether Mayberry  
17 lost the domain name RL.com through fraud and not theft. See CRS,  
18 600 F.3d at 1145-46. This is relevant because, under California  
19 law, if it was lost through theft, the name would belong to  
20 Plaintiffs; if the name was lost by fraud, the name would belong to  
21 Defendants. See id. at 1145 ("the law distinguishes between a  
22 purchaser whose vendor obtained title by fraud and a purchaser  
23 whose vendor obtained title by theft, because an involuntary  
24 transfer results in a void title, whereas a voluntary transfer,  
25 even if fraudulent, renders the title merely voidable."). The  
26 second issue is whether Mayberry's actions constituted abandonment  
27 of the right to possess the domain name RL.com, in which case the

1 name would belong to Defendants. See id. at 1146-47.

2 Plaintiffs argue that they do not have to prove that  
3 Defendants have no defense, but just that they have no meritorious  
4 defense. However, given the Ninth Circuit's opinion, there are  
5 material disputes of fact regarding two meritorious defenses--that  
6 the domain name was lost through fraud and that Mayberry had  
7 abandoned the domain name. Therefore, this factor weighs in favor  
8 of setting aside the default.

9 Because all factors weigh in the Trustee's favor and because  
10 of the strong policy against default judgments, the Court concludes  
11 that the entry of default should be set aside and this case should  
12 proceed to judgment on its merits.

13 IV. Sanctions

14 It is appropriate to condition the setting aside of a default  
15 upon the payment of a sanction. Nilsson, Robbins, Dalgarn,  
16 Berliner, Carson & Wurst v. Louisiana Hydrolec, 854 F.2d 1538,  
17 1546-47 (9th Cir. 1988). The sanction relieves any prejudice  
18 suffered by the non-defaulting party. Id. at 1546.

19 Plaintiffs argue that, if the Trustee's motion is granted, the  
20 Northbay Estate should be sanctioned by conditioning the setting  
21 aside of the default on payment of \$35,607 for the attorneys' fees  
22 and costs Plaintiffs incurred in filing the motions for entry of  
23 default and for default judgment. For the reasons discussed above,  
24 the Court concludes that an award of sanctions is not warranted.

25 CONCLUSION

26 For the foregoing reasons, the Trustee's motion to set aside  
27 the entry of default against Northbay (docket no. 51) is granted

1 and Plaintiffs' administrative motion to schedule a case management  
2 conference (docket no. 65) is granted. A case management  
3 conference is set for Tuesday, December 6, 2011 at 2 p.m. Case  
4 management statements are due one week before that.

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6 IT IS SO ORDERED.

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8 Dated: 10/21/2011



CLAUDIA WILKEN

United States District Judge

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